Congress Says, "Yooou're Out!!!" to the Antitrust Exemption of Professional Baseball: A Discussion of the Current State of Player-Owner Collective Bargaining and the Impact of the Curt Flood Act of 1998

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I. INTRODUCTION

The 1998 baseball season was a season for the ages—Mark McGwire and Sammy Sosa staged a furious and exhilarating race to break Roger Maris's record for the most home runs in a single season;[1] the New York Yankees, arguably the greatest team in the history of baseball, won the World Series;[2] Roger Clemens received a record fifth Cy Young award;[3] and Nolan Ryan, George Brett, and Robin Yount all were inducted into the Hall of Fame on their first time on the ballot.[4] It seemed that in 1998, every golden moment in baseball—and the joy it brought to baseball fans—was highlighted and documented in grandiose fashion by newspapers, magazines, and televisions around the world. The 1998 baseball season reminded Americans and the rest of the world that baseball truly is "America's game," and the enthusiasm of the 1998 season carried into 1999 season. As with the 1998 season, hallowed records were threatened as players like Manny Ramirez, Wade Boggs, Tony Gwynn, Sammy Sosa, and Mark McGwire—again—chased the ghosts of legends past.[5]

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[1] *See* Frank Deford, *The Power and the Glory in Their Dignified Duel: Two-Time Sportsmen Used the Summer of '98 to Exalt the Home Run*, SPORTS ILLUSTRATED, Oct. 7, 1998, at 20, 20.

[2] *See* Tom Verducci, *Mowing Them Down with Awesome Efficiency, These Yankees Flattened the Competition and Raised This Question: Are They the Best Ever?*, SPORTS ILLUSTRATED, Oct. 28, 1998, at 30, 30.

[3] *See* Mel Atonen, *Clemens: 5 Cy Youngs, Blue Jay Unanimous Choice*, USA TODAY, Nov. 17, 1998, at 4C.

[4] *See* Tony Massasrotti, *Ryan Takes Express; Sweeps to Cooperstown on First Try with Brett, Yount*, BOSTON GLOBE, Jan. 6, 1999, at F2.

[5] There were several hallowed baseball records in jeopardy of being broken in this year's baseball season. Manny Ramirez of the Cleveland Indians was threatening seriously to break Hack Wilson's record for the most runs batted in during one season before a mid-season injury cut short his efforts. *See* Jack Curry, *In the Season of Silence, Manny Speaks*, PLAIN DEALER (Cleveland), July 22, 1999, at 6-D. Tony Gwynn and Wade Boggs both joined the elite 3000-hit club. *See Single-Minded as They Closed in on Hit Number 3000*, SPORTS ILLUSTRATED, Oct. 28, 1998, at 44, 44. Sammy Sosa and Mark McGwire again engaged in

Baseball's resurgent popularity is remarkable, given the fact that just four years ago, fans had all but forsaken baseball. Fans were simply sick and tired of the constant labor battles between the owners and the players.[6]

As the end of the current collective bargaining agreement approaches, the possibility of another labor war between the owners and the players threatens baseball's resurrection. In the past, many commentators have clamored for the lifting of baseball's antitrust exemption, a legacy unique to American professional sports, as a possible panacea for all of baseball's labor. Finally, in November of 1998, Congress—with surprisingly little fanfare—replied in kind by passing the Curt Flood Act[7] to lift baseball's antitrust exemption.[8]

What impact will this "landmark" Act by Congress have upon the way players and owners negotiate and resolve their grievances with one another? Is the lifting of baseball's antitrust exemption status the answer to baseball's history of volatile collective bargaining negotiations, or will the impact of the Curt Flood Act of 1998 be as silent as its passage through Congress?

This Note will discuss the evolution of collective bargaining in baseball, its current state of antagonism, and the impact that the Curt Flood Act will have upon the negotiation processes. Part I gives a general overview of antitrust and labor law as well as on the ways in which the collective bargaining process has evolved from the conflict between these strains of law. Parts II, III, and IV discuss the development of professional baseball's antitrust exemption by the courts and the effect it has had upon labor relations. Part V discusses how collective bargaining negotiations have developed into a hostile process between the players and the owners as a direct result of baseball's antitrust exemption, and it offers possible solutions to alleviate the hostility. Finally, Part VI discusses the Curt Flood Act of 1998, its implications for baseball's antitrust exemption, and the effect, if any, that it will have upon baseball's collective bargaining process.

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a two-man race for the home run title and in the process became the only tandem of hitters ever to hit 60 home runs in a season. *See* Dan le Batard & Tim Keown, *Jack 4 Back*, ESPN MAG., Aug. 23, 1999, at 54, 54.

[6] *See* Edward Mathias, *Squeeze Play: Will Baseball's Economic Problems Cause More Legal Headaches for the National Pastime?*, 5 SPORTS LAW. J. 249, 259 (1998) (citing PAUL KAGAN ASSOCS., THE BUSINESS OF BASEBALL 1996, at 44 (1996)).

[7] *See* Curt Flood Act of 1998, 15 U.S.C. § 27a (Supp. IV 1998).

[8] *See id.*; *see also Part of Baseball's Antitrust Exemption Is Overturned: President Clinton Signs the Curt Flood Act of 1998, Which Puts Baseball on Par with Other Sports*, L.A. TIMES, Oct. 28, 1998, at D7.

II. OVERVIEW OF THE DEVELOPMENT OF ANTITRUST LAW AND COLLECTIVE BARGAINING IN THE UNITED STATES

This Part gives an overview of antitrust and labor law that will serve as background material for the remaining discussion in the Note. Subpart II.A discusses how antitrust law has evolved in this country as a result of monopolistic behavior by trusts. Subparts II.B, II.C, and II.D discuss the means by which the legislature and the courts solved the problem of the conflict between collective bargaining under labor law and collective bargaining under the antitrust laws by creating exemptions from antitrust law for collective bargaining agreements.

A. *The Emergence of Antitrust Law in Response to Monopolies*

The period stretching from the 1880s through the early twentieth century spawned the industrial revolution in the United States.[9] Entrepreneurs like John D. Rockefeller were the catalysts of the greatest example of economic expansion this nation has ever experienced.[10] Taking advantage of the relaxed incorporation legislation of individual states,[11] tycoons created megacorporations, or "trusts." From tobacco to whiskey and railroads to oil, the trust was utilized by entrepreneurs as a means to corner a market and stifle competition.[12]

It did not take long for Americans to realize the problems created by the trust. Journalistic muckrakers such as Upton Sinclair[13] and Henry Demarest Lloyd[14] crusaded against trusts and illuminated their evils to the general public, and the public outrage created by muckrakers coerced Congress to create legislation that curbed trust activities which in turn encouraged free trade.[15] In 1890, Congress passed the Sherman Act, designed specifically to ban

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[9] For a general discussion of the Industrial Revolution, see VINCENT TOMPKINS, AMERICAN ERAS IN THE DEVELOPMENT OF THE UNITED STATES (Karen L. Rood ed., 1997).

[10] *See* PETER COLLIER & DAVID HOROWITZ, THE ROCKEFELLERS 36 (1976) (discussing how John D. Rockefeller established the Standard Oil Trust).

[11] *See* ALFRED D. CHANDLER, JR., THE INVISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 250–59 (1977).

[12] *See id.*

[13] Upton Sinclair is most famous for his novel *The Jungle*, a study of the stockyards of Chicago during the turn of the century which lead to the passage of the pure food laws. *See generally* UPTON SINCLAIR, THE JUNGLE (Penguin Books 1982) (1906).

[14] Henry Demarest Lloyd is considered the "original muckraker." An ardent socialist who fought for the rights of the commoner, Lloyd published many works, the most well-known of which is HENRY DEMAREST LLOYD, WEALTH AGAINST COMMONWEALTH (1890).

[15] *See* E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE 32–33 (2d ed. 1989).

conspiracies created to restrain trade and to prohibit the monopolization of trade.[16]

B. *Collective Bargaining Under Labor Law Collides with Antitrust Law*

While the creation of antitrust legislation was developed to break trade monopolies, the laws had the unfortunate and unanticipated result of labeling labor unions as conspiracies against free trade. In *Loewe v. Lawlor*,[17] the hatters' union of Connecticut used its influence over hat finishing manufacturers and distributors to prevent them from soliciting business from the plaintiff's manufacturing company, which maintained a policy of not hiring union employees.[18] The company brought suit against the hatters' union, claiming that the union was a conspiracy against interstate commerce,[19] and the Supreme Court agreed by holding that the hatter's union conspired to restrict trade between the plaintiff's company and his customers.[20] Thus, when the Court held that the hatter's union was violating the antitrust laws, it was stating, in effect, that unionization was a conspiracy against trade.

C. *Congress to the Rescue: The Statutory Exemption of Collective Bargaining from the Antitrust Laws*

In response to *Loewe*, Congress enacted statutory exemptions in order to protect management and union negotiations from being found illegal under antitrust law. First, the Clayton Act of 1914 established that labor is not an article of interstate commerce and is not within the restrictive scope of the Sherman Act.[21] Furthermore, in 1932, the Norris-LaGuardia Act supplemented the Clayton Act by creating a federal policy favoring organized labor.[22] Finally, in 1935, Congress created the National Labor Relations Act[23] (NLRA), which established a federal policy favoring the collective bargaining process between labor and management.[24]

The NLRA was created by Congress to protect workers from unfair labor

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[16] *See* Sherman Act § 1, 15 U.S.C. § 1 (1994 & Supp. IV 1998).

[17] 208 U.S. 274 (1908). This case is better known as the "Danbury Hat" case.

[18] *See id.* at 287.

[19] *See id.* at 292–93.

[20] *See id.*

[21] *See* Clayton Act § 27, 15 U.S.C. § 7 (1994).

[22] *See* Norris-LaGuardia Act, 29 U.S.C. §§ 101–108 (1994).

[23] 29 U.S.C. §§ 151–168 (1994).

[24] *See id.*

practices, to oversee the elections of union representatives, and to enforce collective bargaining agreements between players and owners.[25] The NLRA established the National Labor Relations Board[26] (NLRB) to implement the provisions of the NLRA, to review questions on what labor-management issues fall under the collective bargaining laws of the NLRA, and to decide which labor groups should enjoy coverage under the NLRA.[27]

The NLRB has established three types of labor-management issues, as follows: (1) mandatory subjects, (2) permissive subjects, and (3) illegal subjects.[28] Mandatory bargaining subjects are those subjects that are required by law to be negotiated during a collective bargaining agreement; such subjects include wages, hours, and working conditions.[29] Permissive bargaining subjects are subjects for which the owners and workers may wish to bargain but are not required to do so.[30] Illegal subjects are labor-worker relations about which it is illegal to negotiate.[31]

D. *The Courts to the Rescue: The Nonstatutory Exemption from Antitrust Law*

The Supreme Court also has played a role in the isolation of the collective bargaining process from antitrust law. In *United Mine Workers v. Pennington*,[32] the Court acknowledged that agreements created through the collective bargaining process were exempt from antitrust law. In *Pennington*, the plaintiffs in the case, the United Mine Workers of America, initiated a claim against the defendants, owners of a coal factory, for the payment of royalties.[33] The defendants counterclaimed, alleging that the plaintiffs were engaging in illegal monopolistic conduct by implementing a collectively bargained wage scale that exceeded the financial ability of some coal mining operators.[34] Justice White's opinion stated that the United Mine Workers of America were permitted to bargain such a wage-scale agreement, and he explicitly stated that "the Clayton Act and the Norris-LaGuardia Act permit a union, acting alone, to engage in

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[25] *See id.*

[26] *See id.* §§ 153, 159–160.

[27] *See id.*

[28] *See* PAUL D. STAUDOHAR, THE SPORTS INDUSTRY AND COLLECTIVE BARGAINING 110 (2d ed. 1989).

[29] *See* 29 U.S.C. §§ 151, 158 (1994).

[30] *See* STAUDOHAR, *supra* note 28, at 11.

[31] *See id.*

[32] 381 U.S. 657 (1965).

[33] *See id.* at 657.

[34] *See id.* at 659.

conduct . . . without violating the Sherman Act."[35] Thus, in *Pennington*, the Court created a nonstatutory exemption for collective bargaining arrangements from antitrust law.

E. *Conclusion*

In sum, antitrust law applies to any action by business associations that affects interstate commerce.[36] However, the statutory exemptions from antitrust law established by the Clayton Act, the Norris-LaGuardia Act, and the NLRA, as well as the nonstatutory labor exemption created by the Supreme Court, immunize any agreements created by labor and management via the collective bargaining process from antitrust analysis. Because professional sports also have been deemed a part of interstate commerce and thus are subject to antitrust law,[37] any restraints on trade in professional sports must be the result of collective bargaining agreements between owners and players.

III. BASEBALL'S ANTITRUST EXEMPTION: THE BASEBALL TRILOGY

Until the Curt Flood Act of 1998, baseball was the only professional sports league in the United States to enjoy antitrust exemption status. While other sports aspired to attain a similar status, the courts were adamant in reserving this privilege only for Major League Baseball. The history of the antitrust exemption for Major League Baseball will be elucidated in this Part through a discussion of the following three Supreme Court cases, known collectively as the "baseball trilogy": *Federal Baseball Club, Inc. v. Federal League of Professional Baseball Clubs*,[38] *Toolson v. New York*,[39] and *Flood v. Kuhn*.[40]

A. Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs

The antitrust exemption of the professional baseball leagues first was encountered in *Federal Baseball Club, Inc. v. National League of Professional*

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[35] *Id.* at 662.

[36] *See* Flood v. Kuhn, 407 U.S. 258, 282 (1972).

[37] *See, e.g.*, United States v. International Boxing Club, Inc., 348 U.S. 236, 243 (1955) (holding that the promotion of sporting events on a multistate basis and the selling of rights to televising, broadcasting, and filming sporting contests constitutes "trade or commerce" within the meaning of the Sherman Act).

[38] 259 U.S. 200 (1932).

[39] 346 U.S. 356 (1953).

[40] 407 U.S. 258 (1972).

Baseball Clubs. In *Federal Baseball*, the plaintiff, the Federal Baseball Club of Baltimore, was a member of the Federal League of Professional Baseball Clubs and brought suit against the National League of Professional Baseball Clubs, the American League of Professional Baseball Clubs, and the National Commission (an organization which carried out agreements between the two leagues), alleging that the defendants were conspiring to restrain trade by buying out constituent teams of the Federal League and somehow inducing them to leave the Federal League.[41] The Court stated that because *baseball* exhibitions were "purely state affairs," professional baseball was not a part of interstate commerce and was not subject to the Sherman Act.[42] In its rationale, the Court stated that despite the fact that individuals were crossing state lines to participate in baseball exhibitions, such traveling was "mere incident" to the baseball exhibition, which was itself outside the meaning of "'trade or commerce.'"[43]

B. Toolson v. New York Yankees

The issue of baseball's antitrust status again came into question in 1953, when George Toolson challenged baseball's reserve system as a violation of the Sherman Act. Toolson brought an antitrust suit against the league after he was blacklisted by the Yankees for refusing to honor his contract and accept his reassignment to a minor league team.[44]

The *Toolson* Court reaffirmed the decision in *Federal Baseball*; however, its rationale was different. Rather than stating that baseball was not a part of interstate commerce, as the Court in *Federal Baseball* had done, the Court in *Toolson* stated that any change to baseball's antitrust status should be accomplished through Congress, and that Congress's legislative inactivity in this regard manifested its desire to keep baseball outside the scope of antitrust law.[45] Furthermore, the Court also noted the fact that professional baseball had been operating under the assumption that it was exempt from antitrust law since *Federal Baseball*. The Court did not want to create the adverse retroactive consequences to the operation of baseball that likely would occur if the Court lifted baseball's antitrust-exempt status.[46]

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[41] *See Federal Baseball Club*, 259 U.S. at 207.

[42] *Id.* at 209.

[43] *Id.* (quoting Sherman Act § 1, 15 U.S.C. § 1 (1994 & Supp. IV 1998)).

[44] *See* Toolson v. New York Yankees, Inc., 101 F. Supp. 93, 93 (S.D. Cal. 1951), *aff'd*, 346 U.S. 356 (1953).

[45] *See* Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953).

[46] *See id.*

C. Flood v. Kuhn

In the final case in the baseball trilogy, *Flood v. Kuhn*, the Supreme Court again reaffirmed its holdings in *Federal Baseball* and *Toolson*, but it rationalized its decision in a manner different from that set forth by both the *Federal Baseball* and *Toolson* Courts. Curt Flood, an accomplished outfielder for the St. Louis Cardinals in the 1950s and 1960s, was traded by the Cardinals to the Philadelphia Phillies without his consent.[47] After his request to be made a free agent was denied by the baseball commissioner, Flood filed an antitrust suit against the league.[48] In his opinion, Justice Blackmun stated that the antitrust exemption status of baseball was an "anomaly" enjoyed by professional baseball that catered to its "unique characteristics and needs."[49] Moreover, Justice Blackmun used the congressional inactivity analysis of the Court in *Toolson* to further rationalize professional baseball's exemption from antitrust law.[50]

IV. THE EFFECTS OF *FEDERAL BASEBALL*, *TOOLSON*, AND *FLOOD* UPON MAJOR LEAGUE BASEBALL

This Part of the commentary will discuss the effects of *Federal Baseball*, *Toolson*, and *Flood*. In particular, it will discuss how the holdings in the baseball trilogy were used by the owners to monopolize control over player movement. Part III.A discusses the "reserve system," the method by which the owners historically have exerted monopolistic control over player movement. Part III.B discusses how the courts have streamlined baseball's antitrust exemption to apply only to the reserve system.

A. *The Reserve System: The Ultimate Player Constraint*

The baseball destinies of George Toolson and Curt Flood, discussed above, were controlled by the owners through the reserve system. The reserve system is a direct result of baseball's antitrust exemption, and, arising from the baseball trilogy, it is the most significant method by which the owners were able to restrain player movement in professional baseball. Essentially, the reserve system operates by granting owners the unequivocal right to renew a player's contract under the terms of the previous, expired contract.[51] In other words, when a

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[47] *See* Flood v. Kuhn, 407 U.S. 258, 265 (1972).

[48] *See id.*

[49] *Id.* at 282.

[50] *See id.*

[51] *See* Jonathan M. Conti, *The Effect of Salary Arbitration on Major League Baseball*, 5 SPORTS LAW. J. 221, 224 (1998).

player's contract expires, the owners unilaterally may renew the player's contract despite the fact that the player may deserve a contract more reflective of his individual talents. The reserve system also was used by the owners to prevent players from moving from one team to another or from the major league to another league.[52]

The reserve system has been the most monopolistic and most self-promoting action taken by the owners in light of baseball's antitrust exemption. While this commentary will discuss later the virtual elimination of the reserve system at the major league level, the reserve system was a powerful method by which the owners controlled the labor movement among the players, and it continues to exist undisturbed in the minor leagues.

B. *The Franchise Relocation Issue:* Piazza v. Major League Baseball

In 1988, the city of Tampa Bay, Florida attempted to lure the Giants organization of San Francisco into relocating to Tampa Bay.[53] The investing group from Tampa Bay and the owner of the Giants, Robert Lurie, drafted an exclusivity agreement regarding the sale and relocation of the team and negotiated its sale for $115 million.[54]

In response to the negotiations between Tampa Bay and the Giants, the Ownership Committee for Major League Baseball directed Lurie to consider offers from other investing groups, and National League President Bill White invited another individual to participate in the offer and acceptance process.[55] The owners ultimately rejected the Tampa Bay investing group's offer, and Lurie sold his team to a local investing group for $15 million less than the Tampa Bay investing firm's offer.[56] In response to what he perceived to be a monopolizing tactic used by the owners, Vincent Piazza, part of the Tampa Bay investment group, brought an antitrust suit against the National League.[57]

Piazza asserted that the owners had monopolized the market for team ownership as well as placed restraints upon the "purchase, sale, transfer,

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[52] *See generally* Jonathan C. Tyrns, *Players v. Owners: Collective Bargaining and Antitrust After* Brown v. Pro Football, Inc., 1 U. PA. LAB. & EMP. L.J. 297 (1998) (describing how Hal Chase, a member of the 1914 Whitesox, was prevented by the National Baseball League from switching leagues and playing in the Federal Leagues by the owners).

[53] *See* Piazza v. Major League Baseball, 831 F. Supp. 420, 422 (E.D. Pa. 1993).

[54] *See id.*

[55] *See id.* at 423.

[56] *See Giants to Remain in San Francisco: Florida Group Denied as N.L. Teams Vote 9–4 Against Move*, KANSAS CITY STAR, Nov. 11, 1992, at D1.

[57] *See Men Who Wanted Giants to Get Their Day in Court*, BALTIMORE SUN, Oct. 9, 1994, at A6.

relocation of, and competition for such teams" by rejecting Tampa Bay's offer.[58] Major League Baseball countered this argument by stating that it was exempt from any antitrust actions under *Federal Baseball* and its progeny.[59]

The United States District Court for the Eastern District of Pennsylvania agreed with Piazza and stated that the antitrust exemption afforded to professional baseball only applied to the reserve clause.[60] Thus, the holding of this court put a severe limitation on the antitrust exemption as applied to Major League Baseball. While courts have upheld the antitrust exemption as applied to baseball's reserve system, *Piazza* has held that the reserve system does not apply to franchise relocation or expansion. If the issue of relocation or expansion arises in the future, the holding in *Piazza* will compel owners to demonstrate legitimate economic reasons for their decisions regarding where teams should be located.

V. THE DEVELOPMENT OF COLLECTIVE BARGAINING IN PROFESSIONAL BASEBALL

The previous Part discussed how baseball's antitrust exemption prevented individual players from bringing antitrust actions against the owners when the owners unilaterally implemented restraints on players' ability to play for other teams. Further, it demonstrated how the antitrust exemption became a powerful tool for the owners to achieve their economic interests. Eventually, the players would unite as a collective force and turn to collective bargaining as a means to wrest control over labor issues from the owners. This Part discusses the evolution of collective bargaining negotiations in baseball. In particular, subparts A and B will discuss the history of collective bargaining negotiations that have occurred over the last thirty years and highlight how control over player movement, salary restrictions, and other issues have resulted in acrimony between the owners and the players. Subpart C will investigate theories on why the collective bargaining process has developed into such a contentious process between the owners and the players, and it offers suggestions that may make the process more amicable.

A. *The Birth of Collective Bargaining in the Baseball Industry*

The antitrust exemption status of professional baseball created an imbalance of bargaining power between labor and management.[61] The removal of litigation

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[58] *Piazza*, 831 F. Supp. at 422.

[59] *See id.*

[60] *See id.* at 438. Piazza and Major League Baseball eventually settled this dispute out of court. *See Major League Baseball Settles Law Suit*, REC. N. N.J., Nov. 3, 1994, at S3.

[61] *See* Erwin G. Kranskow & Herman M. Levy, *Unionization and Professional Sports*,

by the Supreme Court as a means of redress for the players against unfair labor practices by the owners left players with little bargaining leverage, leading many commentators to urge players to use collective bargaining to countervail the powers of the owners.[62] In response to the threat of unionization, the owners created a communication system in 1946 to serve as a forum of negotiation between the players and the management.[63] In 1954, the players created the Major League Baseball Player's Association (MLPBA) to serve as a conduit of information for the players in the player-owner communication system.[64] The owners would listen to the grievances of the players through the MLPBA and inform the players of whatever action the club owners were "willing to take" regarding the players;[65] player and owner interactions operated in this one-sided manner for over a decade.[66]

The emergence of the MLPBA as a legitimate labor union coincided with the hiring of Marvin Miller as its executive director.[67] Many commentators have called the hiring of Miller the critical moment in the development of the MLPBA as a legitimate collective bargaining organization.[68] Miller was renowned in the collective bargaining arena for his service as Chief Bargainer. Before serving as Chief Bargainer, Miller was the president of the United States Steelworkers of America for sixteen years and held several positions on presidential labor and management boards.[69] With Miller at the helm of the MLBPA, the players began their foray into the collective bargaining process in capable hands, and they saw their pensions triple, their minimum salary rise from $6,000 to $16,000, and the average player salary more than double.[70]

Coinciding with Miller's hiring was the acknowledgment by the NLRB in 1969 that professional baseball was a part of interstate commerce and thus was

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51 GEO. L.J. 749, 758 (1963).

[62] *See* Robert A. McCormick, *Baseball's Third Strike: The Triumph of Collective Bargaining in Professional Baseball*, 35 VAND. L. REV. 1131, 1150 (1982) (citing Note, *The Balance of Power in Professional Sports*, 22 ME. L. REV. 459, 471 (1970)).

[63] *See id.* at 1151 (citing H.R. DOC. NO. 2002, at 38 (1952)); *see also* LIONEL S. SOBEL, PROFESSIONAL SPORTS & THE LAW 272 (1977)).

[64] *See id.*

[65] *Id.* (citing H.R. DOC. NO. 2002, at 176).

[66] *See id.*

[67] *See* SOBEL, *supra* note 63, at 273.

[68] *See, e.g.*, McCormick, *supra* note 62, at 1152; *see also* Anthony Sica, *Baseball's Antitrust Exemption: Out of the Pennant Race Since 1972*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 295, 328 (1996).

[69] *See* Sica, *supra* note 68, at 328 (citing ROBERT BERRY ET AL., LABOR RELATIONS IN PROFESSIONAL SPORTS 53 (1986)).

[70] *See id.* (citing BERRY ET AL., *supra* note 69, at 53).

under the jurisdiction of the NLRB and subject to the provisions of the NLRA.[71] The NLRB previously had declined to assert its jurisdiction over Major League Baseball because of the Supreme Court's decisions in *Federal Baseball* and *Toolson*.[72] This ruling by the NLRB officially granted professional baseball players the basic labor relations rights, set forth in the NLRA, to self-organization, to bargain collectively through chosen representatives, and to participate in "concerted activities" for the benefit of employees.[73] The finding that professional baseball was under the jurisdiction of the NLRB was a major victory for the players because they now were protected officially under labor law against the unfair practices of the owners, a protection which was not impacted by the game's antitrust exemption status.

B. *The History of Collective Bargaining Between the Player's Union and the Owner's Organizations*

Collective bargaining has been an effective tool for the MLBPA in its attempt to shift the balance of bargaining power the owners previously had maintained. Since the first collective bargaining agreement by players in 1970[74] and their first player strike in 1972,[75] collective bargaining has been the primary method by which players and owners have negotiated key employment issues. An examination of the history of collective bargaining in baseball illustrates the key issues that have caused a rift between the owners and the players, and it will highlight the main bargaining positions being contended during the negotiation process.

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[71] *See* McCormick, *supra* note 62, at 1152 (citing American League of Prof'l Baseball Clubs & Ass'ns of Nat'l Baseball League Umpires, 180 NLRB Dec. (CCH) 190, 190–91 (1969)).

[72] *See id.*

[73] National Labor Relations Act § 8, 29 U.S.C. § 157 (1994).

[74] The first player-owner collective bargaining agreement created a tripartite grievance arbitration panel headed by an impartial chairman; before this collective bargaining agreement any final decisions regarding player grievances were decided by the baseball commissioner, effectually an employee of the owners. *See* Sica, *supra* note 68, at 329 (citing STAUDOHAR, *supra* note 28, at 25).

[75] The first strike instituted by the MLPBA, which lasted 13 days, occurred when players demanded an increase in their pension. The strike ended when the players and team owners reached an agreement that increased players' pensions by $500,000. *See* McCormick, *supra* note 62, at 1153 (citing STAUDOHAR, *supra* note 28, at 110).

1. *The 1973 Collective Bargaining Negotiations: The Elimination of the Reserve Clause*

In 1973, the players and owners negotiated a new collective bargaining agreement that included as one of its provisions an arbitration system that would allow players to submit salary disputes for arbitration by an impartial judge.[76] This agreement between the players and the owners not only "end[ed] the management's powerful authority to determine salaries unilaterally, leaving a dissatisfied player only two options: accept the offer or quit the game"[77]; the agreement also served as the players' method to cripple the reserve clause.

As stated above, the reserve clause allowed the owners to renew the expired contract of a player for one year in the event that a new contractual agreement could not be struck.[78] Through the new arbitration process established by the 1973 collective bargaining agreement, two players, Andy Messersmith of the Los Angeles Dodgers and Dave McNally of the Montreal Expos, backed by the Player's Union, challenged the reserve system after being denied free agency.[79] The dispute between the Players' Association and the owners revolved around the "renewal year" provision. According to the Players' Association, the reserve system's renewal year provision only granted the owners the right to renew the players' original contract for one year, after which they became free agents.[80] The owners, on the other hand, contended that the renewal clause granted them the right to renew perpetually the players' original contracts every year until a new agreement was forged or until they granted a player permission to become a free agent.[81] Peter Seitz, head arbitrator, found in favor of Messersmith and McNally and stated that while the owners and players rightfully could have bargained for the perpetual right to renew a contract on an annual basis, such a right could not be read impliedly into the contract.[82] When the Eighth Circuit Court of Appeals affirmed Seitz's decisions, the players struck a significant blow against the owners control over player movement.[83] Seitz's revolutionary decision that the renewal clause was not perpetual fundamentally altered the

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[76] *See id.* at 1154.

[77] *Id.*

[78] *See id.* at 1155.

[79] *See* Sica, *supra* note 68, at 330 (citing Peter N. Katz, *A History of Free Agency in the United States and Great Britain: Who's Leading the Charge?*, 15 COMP. LAB. L.J. 371, 381 n.58 (1994)).

[80] *See* McCormick, *supra* note 62, at 1155.

[81] *See In re* Twelve Clubs Comprising Nat'l League of Prof'l Baseball Clubs, 66 Lab. Arb. Rep. (BNA) 101, 101 (Dec. 23, 1975).

[82] *See id.* at 113, 114.

[83] *See* Sica, *supra* note 68, at 332.

century-long tradition of the reserve system and in doing so significantly evened the bargaining power between the players and the owners.[84]

2. *The 1976 Collective Bargaining Negotiations: The Owner's Emerging Concerns*

With the Messersmith and McNally decisions on their minds, the owners entered the 1976 collective bargaining agreement negotiations with the intent of stopping the momentum that the players had gained. Fearing the implications of free agency upon player movement and escalating salaries, as well as the effect of shifting competitive advantage towards teams with more capital,[85] the owners aggressively entered the collective bargaining negotiations and struck a deal which bound players to their respective teams for six years, including a renewal option for one year.[86] In return, the owners conceded to increases in the players' pension funds as well as a raise in the players' minimum salaries.[87] However, before the dust settled, the owners instituted a seventeen day lockout to force the players' hand. The 1976 collective bargaining negotiations manifested the concern that the owners had for the players' gains and the battles engaged in by the owners and the players over the issues of player movement and rapidly escalating salaries. These negotiations foreshadowed how these issues would dominate future collective bargaining agreements.

3. *The 1980 Collective Bargaining Negotiation: The Players "Strike" Back at the Owners*

While the 1976 collective bargaining agreement seemed to represent equitable concessions from both sides, salaries rose sharply after the agreement,[88] and the owners aggressively entered the 1981 negotiations with the intention of implementing a strategy to curb salary growth.[89] The strategy was a compensatory system that would compensate teams that were losing players via free agency and a wage scale providing minimum and maximum salaries for

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[84] *See* McCormick, *supra* note 62, at 1156.

[85] *See* Sica, *supra* note 68, at 333 (citing BERRY ET AL., *supra* note 69, at 61; KENNETH M. JENNINGS, BALLS AND STRIKES 35–37 (1990)).

[86] *See* BERRY ET AL., *supra* note 69, at 61.

[87] *See id.*

[88] *See* Thomas J. Hopkins, *Arbitration: A Major League Effect on Player's Salaries*, 2 SETON HALL J. SPORT L. 301, 312 (1992).

[89] *See id.* at 334 (citing BERRY ET AL., *supra* note 69, at 62; JENNINGS, *supra* note 85, at 39).

players with less than six years in the league.[90] However, the MLBPA viewed the provisions proposed by the owners as a conspiracy against player freedom of movement and countered with a proposal for a further reduction of the requirements for free agency.[91] Owners and players maintained hard-line stances and did not agree to a new collective bargaining agreement until July 31, 1981,[92] one and one-half years after the expiration of the 1976 collective bargaining agreement. A new collective bargaining agreement was reached only after two player strikes and much acrimonious negotiation.[93]

Again, player movement was the focus of the collective bargaining agreement that was agreed upon on July 31, 1981 after a fifty-day strike commenced by the MLBPA.[94] The new collective bargaining agreement featured

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[90] *See id.* (citing Thomas Boswell, *Baseball Owners Set up a Sweet Trap*, WASH. POST, Feb. 8, 1980, at F1).

[91] *See id.* at 335 (citing JENNINGS, *supra* note 85, at 43).

[92] The 1976 collective bargaining agreement expired on January 1, 1980, and no agreement had been reached between the owners and the players by March of that year. As a result, the players authorized the use of a player strike during the season. *See id.* (citing JENNINGS, *supra* note 85, at 45; Thomas Boswell, *Baseball Players Authorize a Strike*, WASH. POST, Mar. 5, 1980, at D1). When the owners, in an attempt to ward off the player strike, took the wage scale proposal off of the table on March 18, 1980, the players agreed to postpone the commencement of the strike until Memorial Day weekend. *See* Sica, *supra* note 68, at 335 (citing David Kindred, *Players Call off Rest of Exhibition Baseball Games*, WASH. POST, Apr. 2, 1980, at D1; Shirley Povich, *What Miller Wants Is Usually What Players Get*, WASH. POST, Apr. 13, 1980, at N1). After submitting their differences to mediation as a result of an inability to come to an agreement, the two sides agreed to continue the season according to the old collective bargaining agreement and to postpone discussions regarding the compensation issue until the future. *See id.* (citing Jane Leavy, *Baseball's Strike Is Almost Certain After Talks Stall*, WASH. POST, May 22, 1980, at D1). This labor agreement also created a joint labor/management committee that would make recommendations to the owners regarding the issue of free agency. *See id.* at 336 (citing BERRY ET AL., *supra* note 69, at 66). If no agreement was reached after the report of the joint labor/management committee, the owners were empowered unilaterally to adopt their original 1980 compensation proposal, *see id.* (citing Jane Leavy, *Strike Is off, Study Set on Compensation*, WASH. POST, May 24, 1980, at C1 [hereinafter Leavy, *Strike Is off*]), at which time the players could accept the proposal, accept the proposal only for the 1981 draft with the possibility of striking, or commence a strike on June 1, 1981, *see id.* The committee did not reach an agreement, and the owners, on February 1, 1981, *see id.*, commenced their free agency compensation plan, *see id.* at 337 (citing Red Smith, *A Shot Heard Round Baseball*, N.Y. TIMES, Feb. 20, 1981, at B9). As a consequence, the player's union voted to strike on May 29, 1981, and the strike began on June 12, 1981. *See id.* (citing Murray Chass, *Long Strike Is Feared as Baseball Shuts Down*, N.Y. TIMES, June 13, 1981, § 1, at 1).

[93] *See* Leavy, *Strike Is off*, *supra* note 92, at C1.

[94] *See* Sica, *supra* note 68, at 337 (citing Murray Chass, *Strike over, Baseball Resumes August 9*, N.Y. TIMES, Aug. 1, 1981, § 1, at 1; Jane Leavy, *Baseball Begins Again on August 9*, WASH. POST, Aug. 1, 1981, at A1).

a new free agent system that would compensate teams that were losing players via free agency while allowing player mobility. This free agent system was based upon two pools of players, designated as "pool A" and "pool B"; players were designated as "A" players or "B" players depending upon their performance in the previous two years.[95] The significance of the latter designation was in the different compensation to a team for loss of a given player of a given designation. For instance, a team that lost a player designated as an "A" player would receive as compensation an extra selection in the subsequent year's amateur draft, as well as a player from the compensation pool of players.[96] Teams that lost a player designated as a "B" player would receive as compensation two extra selections in the year's amateur draft.[97]

The 1981 collective bargaining negotiations process elucidates the use of the strike by the MLBPA as a hard-line response to what it viewed as an undesirable labor proposal. The strike has been the players' hard-line bargaining tactic—their trump card—ever since.

4. *The 1985 Collective Bargaining Negotiations: The Salary Cap/Revenue-Sharing System Rears Its Ugly Head*

Despite the provisions in the 1981 collective bargaining agreement that were designed to curtail player salary growth, the players' salaries continued to escalate, and the 1985 collective bargaining agreement negotiations manifested a shift in the owners priority from free agency compensation to decreasing the rate of escalating salary growth.[98] In order to accomplish this objective, the owners proposed to implement a salary cap/revenue-sharing system to limit salary growth,[99] much to the chagrin of the players. As expected, the issue of a

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[95] *See id.* (citing Thomas Boswell, *Owners Pay Maximum for Minimal Victory*, WASH. POST, Aug. 2, 1981, at F6; Chass, *supra* note 94, § 1, at 1; Leavy, *supra* note 94, at A1; Red Smith, *The Fight That Nobody Won*, N.Y. TIMES, Aug. 2, 1981, § 5, at 5).

[96] *See* Leavy, *Strike Is off*, *supra* note 92, at C1. The compensation pool of players consisted of an aggregate pool of all but 24 players of any team that signed an "A" player. *See id.*

[97] *See id.*

[98] *See* Sica, *supra* note 68, at 338 (citing BERRY ET AL., *supra* note 69, at 262). The 1985 collective bargaining agreement negotiations began at the end of the 1984 season, after the 1981 agreement ended. *See id.*

[99] Salary cap provisions in professional sports establish maximum team salaries based on a predetermined percentage of the defined gross revenues of the league. As gross revenues of the league increase, the players' salaries increase at a rate proportional to the predetermined percentage. Salary caps in sports are part of a complex player-owner revenue-sharing agreement whereby the players receive a guaranteed share in aggregate league revenues, and the owners of large market franchises (i.e., moneymaking franchises), whose

salary cap/revenue-sharing system became a major sticking point during the negotiations. When negotiations stalled during the 1985 season, the players again went on strike for two days,[100] forcing the owners to take the salary cap provision off of the negotiating table.[101] Finally, both sides forged an agreement. The owners, in return for limits on a player's opportunity for salary arbitration to a three-year qualification, agreed to increase the minimum salary and granted the players a portion of revenue profits.[102] Furthermore, the new agreement called for the return of the pre-1981 bargaining agreement provision that only compensated draft choices as a means of compensation for losses in free agency.[103]

Frustrated with the inability of collective bargaining, free agency compensation, and restrictions on player mobility to curb the growth of player salaries, the owners decided to take matters into their own hands and adopted a policy not to offer contracts to free agents.[104] This policy was evident in the fact that after the 1985 season, fifty-seven free agent players out of sixty-two resigned with their original teams for contracts less than their original teams had offered.[105] In response, the then and current president of the MLBPA, Donald Fehr, submitted arbitration grievances against the owners, which became known as Collusion I, Collusion II, and Collusion III, and which stated that the owners had conspired against the players and were implementing unfair labor

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profits presumably would increase by virtue of the cap, distribute revenue to club owners in the smaller markets. *See* Thomas C. Picher, *Baseball's Antitrust Exemption Repealed: An Analysis of the Effect on Salary Cap and Salary Taxation Provisions*, 7 SETON HALL J. SPORT L. 5, 37 (1997).

[100] When negotiations between the players and the owners slowed to a halt in July of 1985, the players set a date for a player's strike to begin on August 6, 1985. *See* Sica, *supra* note 68, at 338 (citing Ross Newhan, *Players Set the Strike Date: August 6*, L.A. TIMES, July 16, 1985, at 3-1). After no agreements were made regarding the major impasses at issue, a two-day strike commenced. *See id.*

[101] *See id.*

[102] *See id.* (citing BERRY ET AL., *supra* note 69, at 265–66; JENNINGS, *supra* note 85, at 65; Murray Chass, *Baseball Strike Is Settled; Games to Resume Today*, N.Y. TIMES, Aug. 8, 1985, at A1; Kenneth Reich, *Baseball Strike Settled; Play to Resume Today*, L.A. TIMES, Aug. 8, 1985, at 1-1).

[103] *See id.* at 339 (citing BERRY ET AL., *supra* note 69, at 265–67; Chass, *supra* note 102, at A1; Reich, *supra* note 102, at 1-1). This concession was made by the owners, in part, because the compensation system of the 1981 collective bargaining agreement only resulted in eight players being awarded as compensation, a curious result considering the aggressiveness with which the owners had negotiated regarding this issue. *See id.*

[104] *See id.* at 340 (citing JERRY GORMAN & KIRK CALHOUN, THE NAME OF THE GAME 153 (1994)).

[105] *See id.*

practices.[106] The arbitrators agreed with the MLBPA in the summer of 1990, stating that the owners were in violation of the 1985 collective bargaining agreement and were liable to pay the players $280 million in damages by December 31, 1990.[107] Collusions I, II, and III demonstrate how the collective bargaining process was not satisfying the owners' objectives. Furthermore, and more importantly, Collusions I, II, and III exemplify the owners' occasional bad faith bargaining to achieve their goals as well as the burgeoning bitterness between the owners and players.

5. *The 1990 Collective Bargaining Negotiations: A New and Improved Bargaining Process?*

When the 1985 collective bargaining agreement expired, the owners again focused their attention on the ever-increasing player salaries and proposed for the new collective bargaining agreement a new salary system based upon revenue sharing.[108] Viewing the proposal as a form of salary cap, the players rejected the revenue-sharing system proposal, prompting the owners to implement a lockout on February 15, 1990.[109] Eventually, on March 18, 1990, the parties resumed talks[110] and agreed upon a new collective bargaining agreement; the owners removed the possibility of the implementation of a salary cap from the bargaining table[111] and agreed to the players' proposal for liberalized salary arbitration,[112]

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[106] *See id.*

[107] *See id.* at 341 (citing GORMAN & CALHOUN, *supra* note 104, at 154).

[108] *See id.* (citing Murray Chass, *Chill of Labor Impasse Threatens Baseball's Spring*, N.Y. TIMES, Feb. 9, 1990, at A1). The players' average salaries had increased dramatically since the emergence of free agency in 1976; for example, in 1984 the average salaries were more than six times higher than the average salary before the 1976 collective bargaining agreement, and the top players' salaries were as high as $2 million per season. *See id.* The new salary system proposed by the owners would give players 48% of the gross income from ticket sales as well as television and radio rights, to be distributed to players through a wage scale. *See id.* at 342. Distributions to players with less than six years experience would be determined in part by an index of performance, while distributions to players with more than six years experience would be free to negotiate their contracts, limited by the team's determined payroll. *See id.*

[109] *See id.* (citing Murray Chass, *Negotiations Exchange Outlooks on Talks*, N.Y. TIMES, Feb. 16, 1990, at A26; Helene Elliot, *The Sounds of Silence Haunt Those Waiting for Angels to Take the Field*, L.A. TIMES, Feb. 16, 1990, at C8; Richard Justice, *Negotiators Hit Salary Arbitration; Baseball Camps Closed as Talks Narrow Focus*, WASH. POST, Feb. 16, 1990, at F1).

[110] *See id.* at 343 (citing Murray Chass, *Baseball's Labor Dispute Settled with Compromise on Arbitration*, N.Y. TIMES, Mar. 19, 1990, at A1; Ross Newhan, *Lockout Ends*, L.A. TIMES, Mar. 19, 1990, at C1).

[111] *See id.*

while the players accepted the owners' terms regarding minimum salaries and salary arbitration.[113] Furthermore, the parties agreed that renegotiation could reopen on the issues of free agency, arbitration, and minimum salaries after three years.[114] For the first time during the twenty years of collective bargaining between the owners and the players, both sides approached the negotiations with the perception that good faith bargaining was necessary for the sport.

The optimism created by the atypically smooth 1990 negotiations was short-lived, however. In December of 1992, the owners' voted to reopen the agreement during the 1993 season to discuss the issues of free agency, salary arbitration, and minimum salary.[115] Negotiations continued throughout the 1993 and 1994 seasons, despite the fact that the 1990 collective bargaining agreement expired on December 31, 1993, after the 1993 season had ended.[116] Finally, on July 19, 1994, towards the end of the season, the players instituted a strike to begin on August 12, 1994, and the owners as a result canceled the season after almost two years of acrimonious negotiations.[117] The strike lasted for seven months,[118] cutting off 75 regular season games as well as the World Series.[119] During this

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[112] *See id.* (citing, inter alia, Joseph Durso, *Back to Work with Mixed Reviews*, N.Y. TIMES, Mar. 20, 1990, at B15). This salary arbitration agreement provided that players with two years of experience would be eligible for arbitration. *See id.*

[113] *See id.*

[114] *See id.* (citing Murray Chass, *Baseball Negotiators Cleaning up Loose Ends*, N.Y. TIMES, Mar. 20, 1990, at B11).

[115] *See id.* at 343–44 (citing Murray Chass, *Baseball Owners Vote to Reopen Labor Talks*, N.Y. TIMES, Dec. 8, 1992, at B17; Mark Maske, *Baseball Owners Reopen Labor Talks; Spring Lockout Uncertain*, WASH. POST, Dec. 8, 1992, at E1; Mark Maske, *Chance of Lockout Downplayed; Negotiator Says Owners Want Salary Cap Based on Revenue*, WASH. POST, Jan. 14, 1993, at D1; Ross Newhan, *Baseball Lockout Deemed Unlikely; Negotiations: Owners' Representative Reopens Bargaining by Saying He Will Recommend Against Hostile Threats*, L.A. TIMES, Jan. 14, 1993, at C2).

[116] *See id.* at 344–45.

[117] *See id.* at 345 (citing Murray Chass, *No Runs, No Hits, No Errors: Baseball Goes on Strike*, N.Y. TIMES, Aug. 12, 1994, at A1; Richard Justice, *With Baseball's Last Out, a Strike; Players Walk off Job After Failing to Agree with Owners*, WASH. POST, Aug. 12, 1994, at A1; Ross Newhan, *Owners Gripe as Baseball Strike Begins*, L.A. TIMES, Aug. 12, 1994, at A1). Again, the source of the strike was the owners' attempt to implement a salary cap system. *See id.* (citing Murray Chass, *Owners and Players Stand Still; Clock Runs*, N.Y. TIMES, July 19, 1994, at B9; Richard Justice, *Strike All but Certain; Baseball Players, Owners Won't Yield on Salary Cap*, WASH. POST, July 19, 1994, at E1; Ross Newhan, *Players' Union Rejects Owners' Salary Cap; Negotiations Will Continue Wednesday, but a Strike Date Is Expected by July 31*, L.A.TIMES, July 19, 1994, at C4).

[118] *See* Joseph A. Kohm, Jr., *Baseball's Antitrust Exemption: It's Going, Going . . . Gone!*, 20 NOVA L. REV. 1231, 1232 (1996).

[119] *See id.*

strike, the conflict escalated even further when each side accused the other of failing to bargain in good faith and filed grievances with the NLRB.[120] The strike was costly to owners, players, and fans alike—revenue losses were estimated at $1 billion.[121] Furthermore, baseball's image as America's pastime was tarnished. Intervention from President Bill Clinton[122] and an injunction issued by a federal court saved baseball by coercing negotiations and ordering the owners to implement temporarily the terms of the expired 1990 collective bargaining agreement.[123]

These negotiations, perhaps more than any other negotiations, demonstrate how opposed owners and players have become as far as labor issues are concerned. During this conflict, the players absolutely were resolved not to surrender any of the freedoms they obtained through collective bargaining, and the owners, in the face of excessive costs, absolutely were resolved to take preventative measures at the expense of the players.

6. *The 1996 Collective Bargaining Negotiations: A Tenuous Peace Between Owners and Players*

After four years of bitter negotiations, the owners and players finally agreed upon a collective bargaining agreement covering the period between 1996 and 2000 to replace the previous collective bargaining agreement, which had been extended beyond its terms in order to avoid the loss of the 1995 season.[124] The

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[120] *See* Peter Schmuck, *Players, Owners File Grievances with NLRB*, BALTIMORE SUN, Dec. 28, 1994, at 4E. The players filed a grievance with the NLRB, accusing the owners of failure to bargain in good faith after the owners unilaterally declared an impasse in negotiations on December 22, 1994 and implemented a salary cap system. *See id.* The owners countered, stating that the players failed to bargain in good faith in regards to wages. *See id.* Eventually, under pressure from the NLRB, the owners withdrew their implementation of the salary cap on February 6, 1995, and the NLRB promised in turn not to issue any complaints against the owners in return for their voluntary lifting of the salary cap. *See* Mark Maske, *Baseball's Waiting Game: Now Both Sides Cool off*, WASH. POST, Feb.12, 1995, at D1.

[121] *See* Jeffery S. Moorad, *Major League Baseball's Labor Turmoil: The Failures of the Counter-Revolution*, 4 VILL. SPORTS & ENT. L.J. 53, 83 (1997).

[122] *See id.* at 78–79. In a proactive move by the Clinton administration to end the baseball strike of 1994–1995, President Clinton appointed William Usery, former labor secretary, to mediate the dispute between the players and the owners in October of 1994. *See id.* Usery's eventual failure to resolve the differences between the owners and the players is discussed briefly below. *See infra* Part V.D.

[123] *See* Mark Maske, *NLRB Votes to Seek Injunction Against Baseball Owners*, WASH. POST, Mar. 27, 1995, at D1.

[124] *See* Stephan Fatsis, *Baseball Pact Is Ratified by Owners*, WALL ST. J., Nov. 27, 1996, at A3.

new collective bargaining agreement features concessions for both sides; during this collective bargaining agreement the players receive an increase in their minimum salary, as well as time-in-service credit for the seventy-five playing days they had missed during the 1994 season. In return the owners are permitted to implement a luxury tax on the five teams having the biggest aggregate player payrolls[125] and player salary taxes,[126] and they will be allowed an increase in the amounts of revenue sharing.[127] Revenues from these sources are pooled and then divided among small market teams to help these teams compete, given the current environment favoring player mobility.[128]

C. *Owners and Players Clear the Benches: The Collective Bargaining Brawl*

While the collective bargaining process eventually has resulted in new agreements between the players and the owners upon the expiration of each previous agreement, the process has been, for most part, highly contentious. The owners vehemently have adopted a bargaining position to abrogate player gains in "free agency, salary arbitration, and freedom of salary controls"[129] and have repeatedly bargained in bad faith.[130] The MLBPA, on the other hand, also has acted contentiously during the collective bargaining process. For example, Donald Fehr, during the 1994 collective bargaining negotiations, escalated the MLBPA's hard-line negotiation tactics into hostile negotiation tactics by publicly criticizing, berating, and insulting the owners.[131]

Thus, while it is difficult to refute the conclusion that the collective bargaining process has been ineffective in eventually producing labor agreements in major league baseball, the collective bargaining process has been detrimental to the relationship between the players and the owners, and more importantly, it has eroded fan enthusiasm in America's game. Furthermore, the collective bargaining process has been expensive for both sides. For example, during the

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[125] The "luxury tax," imposed upon the five teams with the biggest aggregate payrolls, will consist of 35% of those teams' payrolls in excess of $51 million. *See id.* The revenues from these sources will be pooled and then divided among small market teams. *See id.*

[126] *See id.* The "players' salary tax" will tax players' individual salaries by 2.5%. *See id.*

[127] *See id.*

[128] *See id.*

[129] Moorad, *supra* note 121, at 58.

[130] *See* Eric Long, *The 1994 Baseball Strike Revisited: A Better Impasse Analysis*, 22 S. ILL. U. L.J. 117, 146 (1995).

[131] *See Negotiations Regress to Name Calling; Union Chief Goes on Rampage, Rips into "Hatchetman" Ravitch*, SALT LAKE TRIB., Aug. 23, 1994, at D3.

1994 strike, the owners lost an estimated $376 billion in attendance revenues in 1994 and $326 billion in lost attendance revenues in 1995.[132] On the other hand, the players lost $243 million in lost wages as a result of games being cancelled,[133] and numerous ancillary revenue-generating sources were lost, such as endorsement revenues and similar marketing revenues.[134]

D. *Changing the Collective Bargaining Process: Principled Bargaining Will Facilitate Baseball's Collective Bargaining*

What caused the negotiation process between the owners and players to develop into a full-scale war? One problem with the negotiation process between the owners and the players has been that both sides traditionally have used a positional bargaining technique.[135] Both the owners and the players view the negotiation process as a contest[136]; according to both owners and players, one side inevitably must win and the other inevitably must lose. This type of bargaining rationale has lead to both sides responding with myopic positions as to how the negotiations should end.[137] To use the 1994 negotiations as an example, the players entered the negotiation process with the absolute goal of preventing a salary cap system, while the owners entered the negotiation process with the fullest intention of forcing the players into agreeing to a salary cap system.[138] Antagonistic, hard-line positions such as these often lead to hostile negotiations and bog down the negotiation process because neither side is willing to compromise.[139] With positional bargaining, both negotiating parties—the owners and the players—are intent upon producing a favorable result at the expense of the other party.[140]

One method of alleviating the hostility between the owners and the MLPBA would be to change the current bargaining techniques being used by the players and owners from positional bargaining to principled bargaining.[141] With

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[132] *See* Moorad, *supra* note 121, at 82.

[133] *See id.*

[134] *See id.* at 53, 82.

[135] *See* Christopher Fisher, *The 1994–1995 Baseball Strike: A Case Study in Myopic Subconscious Macroscopic Response to Conflict*, 6 SETON HALL J. SPORT L. 367, 391 (1996).

[136] *See id.*

[137] *See id.*

[138] *See id.* at 374–75.

[139] *See id.*

[140] *See* Steven S. Goldberg & Dixie Snow Huefner, *Dispute Resolution in Special Education: An Introduction to Litigation Alternatives*, 99 EDUC. L. REP. 703, 708 (1995).

[141] *See* Fisher, *supra* note 135, at 373; Roger Fisher & William Jackson, *Alternative*

principled negotiations, the objective of the negotiations is to solve a mutual problem rather than to win a contest against an adversary.[142]

Principled negotiation techniques can be described in five basic steps, as follows: (1) "[s]eparate the people from the problem"; (2) focus on one's own and the other side's underlying interests rather than insisting upon a bottom-line position; (3) "invent options for [the] mutual gain" of both parties; (4) use objective standards and criteria during negotiations; and (5) prepare a best alternative to a negotiated agreement (BATNA).[143]

The first step of principled negotiation, separating the people from the problem, aspires to aid both sides in focusing on the opposing parties as people and, in doing so, eliminating the possibility of the parties' relationship becoming entangled with their discussions of substance during the negotiation process.[144] Separating the people from the problem can be accomplished through a mutual understanding by each party of the other party's position[145] and the motivations behind their positions, as well as through the acknowledgment that both parties have emotions connected to the substantive issues that should not interfere with the negotiations.[146] Both parties must communicate their needs effectively while at the same time listening to the other party's needs through fostering a working relationship that prevents a reversion to positional bargaining.[147]

The second step of principled negotiation, focusing on one's interests and the interests of the opposing party rather than assuming hard-line positions, is designed to ascertain whether the two parties have any mutual interests between them.[148] This step is accomplished by parties ascertaining their interests as well as the interests of the opposing party and by communicating with one another about these interests.[149]

The third step of principled negotiation, inventing options for mutual gain, focuses upon brainstorming for creative solutions to issues by each party, with the goal of identifying a mutually appealing option.[150] After brainstorming, both

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Dispute Resolution and Procedural Justice: Teaching the Skills of Settlement, 46 SMU L. REV. 1985, 1988 (1993).

[142] *See* ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 10–13, 80–100 (Bruce Patton ed., 2d ed. 1991) (describing the process and goals of principled negotiation).

[143] *Id.*

[144] *See id.* at 22.

[145] *See id.* at 22–26.

[146] *See id.* at 28–36.

[147] *See id.* at 36–39.

[148] *See id.* at 42.

[149] *See id.* at 40–55.

[150] *See id.* at 55–80.

sides should identify the most promising ideas, invent improvements for promising ideas, and set up a time to evaluate ideas and decide.[151]

The fourth step of the process, insisting on objective standards to determine necessary facts and figures for the negotiation process, aspires to bring standards of fairness to produce a final solution that is equitable for both sides.[152] Obtaining objective standards and criteria can be accomplished by both sides listening to the other side's statements regarding research or by mutually agreeing upon an expert to provide information.[153]

The fifth step of the process, determination of a BATNA, is designed as a fallback for both parties should a negotiation impasse occur.[154] This step is designed to identify an alternative measure that will serve as a standard to compare any proposal from the other side and, more importantly, will serve as protection for each party's interests upon failure of the negotiations.[155]

1. *Applying Principled Negotiations to the Collective Bargaining Process of Baseball*

Under the standards of principled negotiations, the players and owners initially would have to divorce themselves from viewing each other as competitors in a contest, as they traditionally have done in previous collective bargaining negotiations. This would be the "separating the people from the problem" stage of the negotiation process. The goal of this initial step is to prevent the players and owners from adopting the "us against them" attitude that in the past has introduced emotion into the bargaining process and has led to very acrimonious relations and numerous player strikes.

The next step of the negotiation process would be to identify the interests that the owners and the players may have in common. While the players and the owners have their own separate interests in maintaining player movement and cutting costs, respectively, both parties share the mutual interests of fostering competition between the teams and, most importantly, keeping their fans happy. Both sides must realize that hard-line positions—namely, the player's desire to avoid a salary cap/revenue-sharing system and the owners' desire to curb salary growth—will not result in fulfillment of their mutual goals. Rather, hard-line positions will lead only to the discussion of self-serving options and frustrate the process.

After mutual interests have been identified, the players and owners would

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[151] *See id.* at 62.

[152] *See id.* at 80.

[153] *See id.* at 82–94.

[154] *See id.* at 97–106.

[155] *See id.* at 98–100.

have to incorporate the interests of the opposing party (as identified in the first two steps of the process) into viable collective bargaining options. This is the "inventing option for mutual gain" tactic of principled negotiations. As mentioned above, a salary cap/revenue-sharing system, which limits player movement by limiting the amount that teams may spend on free agents, has been the primary impasse in recent negotiations. Using the salary cap/revenue-sharing system as an example, the players should recognize that the owners are going to propose ideas that will address directly their concern with the rapid growth of salaries and competition within the league. The owners, on the other hand, should recognize that the players have fought long and hard for their gains in player movement and that a salary cap/revenue-sharing system represents a serious threat to these gains.[156]

Using this step in the principled negotiation bargaining process, the owners and players should be able to determine options in a cooperative fashion that are appealing to both sides rather than creating agreements after bitter negotiation and striking. Through this step of the principled bargaining process, the owners and the players should be able to have an open dialogue about viable options that satisfy both their goals.

For example, the owners and the players could discuss a change in the current arbitration system, a system under which the league has been operating since the 1970s. Indeed, salary arbitration is considered one of the primary reasons for why salary costs have escalated at such an astounding rate.[157] Under the arbitration system, known as "baseball arbitration,"[158] a player having between two and six years of major league experience may file for arbitration if he cannot agree with his team on how much he should be compensated for his services.[159] Both the player and team submit what they consider fair compensation for the player's services to a disinterested arbitrator, and this arbitrator makes a final decision on what the player should make from the two submissions.[160] The arbitrator looks at the quality and the consistency of the contributions of the player to his team, the player's previous salary history, comparable baseball salaries, the performance of the club, and whether the player

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[156] *See* Christopher D. Cameron & J. Michael Echevarria, *The Ploys of Summer: Antitrust, Industrial Distrust, and the Case Against a Salary Cap for Major League Baseball*, 22 FLA. ST. U. L. REV. 827, 862–63 (1995).

[157] *See* Marc Chaplin, *It Ain't Over 'Til It's Over: The Century Long Conflict Between the Owners and the Players in Major League Baseball*, 60 ALB. L. REV. 205, 221 (1996).

[158] *See* Thomas J. Brewer & Lawrence R. Mills, *Combining Mediation & Arbitration*, DISP. RES. J., Nov. 1999, at 32, 38 (1999).

[159] *See* Conti, *supra* note 51, at 228.

[160] *See id.* at 228–29.

has any physical or mental ailments.[161]

There are flaws in the current system that are extremely detrimental to the owners' interests. First, once a player qualifies and elects to arbitrate, the owners have no other option but to participate.[162] Furthermore, a player utilizing arbitration virtually always succeeds in receiving a significantly higher salary than his previous salary permitted.[163] This is due to the fact that the player typically can submit a significantly higher offer (as compared to his current salary) to the arbitrator, and an owner, in response, submits an offer that is typically lower, but still higher than what the player was earning under his previous contract.[164] No matter what the arbitrator decides, the player makes significantly more money than he had previous to arbitration because the arbitrator is bound by the salary range submitted by the players and the owner.[165]

One solution to this problem would be to give the arbitrator more leeway in his or her decision as to how much the player should earn, rather than giving him only the choice between two offers that reflect polar interests.[166] Such an arbitration system would allow the arbitrator to decide upon a salary amount that more accurately reflects the player's true market value. Players still will gain increases in salary amounts, and owners would not view salary arbitration as a lose-lose situation.[167] Thus, the arbitration system change represents just one of many options for mutual gain under this step of principled bargaining that can help the owners and players better identify mutually beneficial options.

The fourth step of principled bargaining, insisting on objective standards to determine necessary facts and figures, would require the players and the owners to rely upon some standard of objective criteria during their negotiations. In the past, the players and the owners have expressed suspicion about each others' sources of information,[168] and it appears that a source of objective information

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[161] *See* HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATIONS 103, 110–11 (1982).

[162] *See* Conti, *supra* note 51, at 232.

[163] *See id.*

[164] *See id.*

[165] *See id.* For example, Randy Velarde, former infielder for the New York Yankees, was awarded a $1.05 million contract for the 1993 season via arbitration, despite the fact that Velarde was an average baseball player who, as a part-time player, only played 75% of the games played in the previous year. *See* Chaplin, *supra* note 157, at 205. Despite the fact the Yankees offered Velarde a 67% increase in salary, the arbitrator nonetheless rewarded Velarde with a contract that exceeded 290% of Veldarde's 1992 salary of $360,000. *See id.* Such egregious increases in a player's income as a result of arbitration—even for average players like Velarde—are commonplace. *See id.*

[166] *See id.* at 235.

[167] *See id.*

[168] *See, e.g.*, Mark Maske, *Owners Study Rebuts Report by the Players*, WASH. POST, Oct. 26, 1994, at F1. Maske discusses the dispute over management fees paid to owners

would ease the distrust harbored by both sides. A mediator, selected by both the players and the owners, could help in the information sharing process. This objective mediator reminds the parties that previous positional bargaining techniques have been ineffective in solving their mutual problems and that a less contentious method of negotiation would better effectuate their goals.[169] The mediator also can serve as a source of reliable information or select an objective source of information for both sides. A mediator that serves as a source of objectivity could inject fairness into the negotiation process, which would foster the creation of an equitable conclusion.[170]

Finally, in the event that an impasse occurs in the negotiation process, both sides would identify their BATNA. Given the past history of the collective bargaining negotiations of both parties, it should not be difficult for either side to determine its BATNA; in fact, neither side has much option. For the owners, the best alternatives have been a lockout or the unilateral implementation of the old collective bargaining provisions upon the occurrence of a negotiation impasse. For the players, the traditional alternative to a negotiating agreement has been a strike.[171] Both BATNAs are strong bargaining tools for their respective sides, and they have been used in the past by both parties to coerce the

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during the collective bargaining negotiations in 1994. *See id.* During the dispute, the owners questioned the credibility of the players' union's economist, Roger Noll, while Noll accused the owners from "hiding large amounts of revenues through excessive general and administrative expenditures." *Id.*

[169] *See generally* Cameron Collar Fernandez & Jerry Spolter, *International Intellectual Property Dispute Resolution: Is Mediation a Sleeping Giant?*, DISP. RESOL. J., Aug. 1998, at 62.

[170] As mentioned previously, President Clinton appointed mediator William Usery to mediate the last round of negotiations. *See supra* note 122 and accompanying text. Unfortunately, Usery was largely unsuccessful in his attempts to coerce the owners and the players to form a new agreement. *See Congress and Baseball*, WASH. POST, Feb. 10, 1995, at A22; *Courting a Solution*, SPORTS ILLUSTRATED, Apr. 3, 1995, at 21, 21; Mark Maske, *President Puts Pressure on Baseball; Feb. 6 Deadline Set for Strike Resolution*, WASH. POST, Jan. 27, 1995, at A1; Mark Maske, *Usery Plans to Stay Involved; Despite Criticism, Baseball Negotiator Wants to Continue*, WASH. POST, Feb. 6, 1995, at D1. Although why precisely William Usery was unable to mediate successfully an agreement between the owners and the players is beyond the scope of this Note, an argument can be made that his lack of success is grounded in the fact that the owners and the players held their hard-line positions so firmly that mediation was useless. *See, e.g.*, James R. Devine, *The Legacy of Albert Spalding, the Holdouts of Ty Cobb, Joe DiMaggio, and Sandy Koufax/Don Drysdale, and the 1994–1995 Strike: Baseball's Labor Disputes Are as Linear as the Game*, 31 AKRON L. REV. 1, 73 (1997).

[171] However, with the passage of the Curt Flood Act of 1998, 15 U.S.C. § 27a (Supp. IV 1998), the players may have another option in their BATNA arsenal. This possibility will be discussed in greater detail below.

other back to the bargaining table.[172]

Thus, a change from positional bargaining methods to principled negotiation methods would make the collective bargaining process more efficacious and less hostile for the players and owners. Principled bargaining would eliminate the cycle of impasse and strike that has plagued collective bargaining in baseball in the past by allowing the owners and the players to recognize the interests of the other side and by allowing them to identify mutually appealing solutions. Principled bargaining would allow both sides to devise an equitable agreement that would satisfy the owners' and the players' mutual and individual needs in maintaining fan interest and competition within the league, all while fostering a less acrimonious bargaining process.

VI. THE CURT FLOOD ACT OF 1998 AND ITS IMPLICATIONS ON NEGOTIATIONS BETWEEN OWNERS AND PLAYERS

As discussed earlier, baseball's antitrust exemption was once a powerful method for the owners to control the economics of baseball. Now that the Curt Flood Act has been enacted, what role will the antitrust exemption have upon the relations between the players and the owners? At first glance, one would assume that the lifting of baseball's antitrust exemption would be a huge victory for the individual player—he would have the chance to succeed in an antitrust suit against the league. However, how important is this chance, given the fact that the owners and the players have been utilizing collective bargaining as a means of resolving disputes for thirty years? What role will this chance to bring an antitrust suit have upon the state of collective bargaining? This Part discusses the provisions of the Curt Flood Act of 1998 in subpart A, and it analyzes how the lifting of the antitrust-exempt status of baseball will affect the collective bargaining process of the owners and the MLPBA in subpart B.

A. *An Overview of the Curt Flood Act*

Over the years, many bills have been introduced to Congress addressing the subject of baseball's antitrust exemption. Recognizing the need for antitrust laws to apply to baseball after the disastrous 1994 and 1995 seasons, Senators Orrin Hatch of Utah, Patrick Leahy of Vermont, Strom Thurmond of South Carolina, and Daniel Patrick Moynihan of New York introduced a bill entitled "The Curt Flood Act" to the Judiciary Committee on January 21, 1997.[173] After the bill's

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[172] *See supra* Part VI.

[173] *See* S. 53, 105th Cong. (1997). *See generally* 123 CONG. REC. S53,418–20 (daily ed. Jan. 21, 1997). During the previous 104th Congress, a virtually identical bill, the Major League Baseball Antitrust Reform Act of 1995, had been reported out of the Judiciary

introduction, the players and owners during the 1997 collective bargaining meetings vowed to cooperate in lobbying Congress to create legislation that would put baseball under the ambit of antitrust law.[174] Recognizing baseball's willingness to support their bill, Senators Hatch and Leahy communicated with both the players' union and the owners regarding their willingness to work with both parties to achieve the expeditious passing of their bill.[175] After an amendment was added to the Curt Flood Act to clarify that the minor leagues were not to be in any way affected by the bill,[176] the Judiciary committee voted upon and approved the Curt Flood Act on July 31, 1997.[177] On October 7, 1998, both the House of Representatives and the Senate passed it, and on October 27, 1998, the President signed the Act into law.[178]

The purpose of the Curt Flood Act is "to state that major league baseball players are covered under the antitrust laws" or, in other words, that "major league baseball players will have the same rights under the antitrust laws as do other professional athletes."[179]

Section three of the Act is divided into four subsections that define what conduct may trigger an antitrust suit and what conduct is excluded from the Act, and they define when a player may bring an antitrust suit under the Act.[180]

The first major subsection of the Act defines the type of conduct that may trigger an antitrust suit as any "conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball" that are

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Committee but was not considered by the full Senate during its 104th session. *See* S. 627, 104th Cong. (1996).

[174] *See* H.R. REP. NO. 105-845, at 100 (1998). The players' and owners' cooperative efforts ultimately were commemorated in article XXVIII of their Basic Agreement, which reads:

> The Clubs and the Association will jointly request and cooperate in lobbying the Congress to pass a law that will clarify that Major League Baseball players are covered under the antitrust laws (i.e., that Major League Players have the same rights under the antitrust laws as do other professional athletes, e.g., football and basketball players), along with a provision that makes it clear that passage of that bill does not change the application of the antitrust laws in any other context or with respect to any other person or entity.

Id.

[175] *See id.*

[176] The amendment reads, "nothing in this subsection shall be construed as providing the basis for any negative inference regarding the case law concerning the applicability of the antitrust laws to minor league baseball." *Id.*

[177] *See id.*

[178] *See id.*

[179] Curt Flood Act of 1998 § 2, 15 U.S.C. § 27a note (Supp. IV 1998) (Purpose).

[180] *See* 15 U.S.C. § 27a(a)–(d).

"directly" related to or that "affect[] employment of major league baseball players . . . ."[181]

The second major subsection limits the scope of the application of antitrust law by creating a list of "conduct, acts, practices, or agreements" that do not create an antitrust act.[182] It excludes "conduct, acts, practices, or agreements" relating to the operation of employment in the minor leagues from antitrust protection.[183] The Act goes on to exclude any "agreement between organized professional major league baseball teams and the teams of the National Association of Professional Baseball Leagues," any agreements between "professional major league baseball" and the minor league teams, and "any other matter relating to organized professional baseball's minor leagues . . . ."[184] Further, it excludes any conduct relating to "franchise expansion, location or relocation, franchise ownership issues, including ownership transfers, the relationship between the Office of the Commissioner and franchise owners," as well as any "marketing or sales" issues.[185] The Act also excludes any "conduct, acts, practices, or agreements" protected by the Sports Broadcasting Act of 1961.[186] Finally, the Act excludes any agreements between organized professional baseball and umpires[187] as well as other employees of major league baseball who are not "in the business of organized professional major league baseball."[188]

The third major subsection of the Curt Flood Act defines a party that may bring suit upon a cause of action under its provisions—in other words, it defines who is a baseball player under this statutory regime. According to this subsection, a baseball player is anyone who (1) "is a party to a major league player's contract, or is playing baseball at the major league level"; (2) "was a party to a major league player's contract or playing baseball at the major league level at the time" the cause of action arose; (3) "has been a party to a major league player's contract or who has played baseball at the major league level, and who claims he has been injured in his efforts to secure a subsequent major league player's contract by an alleged violation of antitrust laws"; or (4) "was a party to a major league player's contract or who was playing baseball at the major league level at the conclusion of the last full championship season" before the

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[181] *Id.* § 27a(a).

[182] *Id.* § 27a(b).

[183] *Id.* § 27a(b)(1).

[184] *Id.* § 27a(b)(2).

[185] *Id.* § 27a(b)(3).

[186] *Id.* § 27a(b)(4); *see also* Sports Broadcasting Act of 1961, 15 U.S.C. §§ 1291–1295 (1994).

[187] *See* 15 U.S.C. § 27a(b)(5).

[188] *Id.* § 27a(b)(6).

"expiration of the last collective bargaining agreement . . . ."[189]

The Act further states that minor league players may bring an antitrust suit if the alleged "conduct, acts, practices, or agreements" that the player bases his action upon relate to baseball at the major league level and the "conduct, acts, practices, or agreements" relate to or affect employment of "major league baseball players" to play baseball at the major league level.[190]

B. *The Impact That the Curt Flood Act Will Have on Professional Baseball*

1. *Is an Antitrust Action Under the Curt Flood Act a Legitimate Threat Against the Owners?*

Theoretically, when the 1996 collective bargaining agreement expires later this year, the MLBPA will have an opportunity to utilize the threat of an antitrust claim against the owners as a tool in gaining major concessions during the next collective bargaining agreement negotiations. However, is the threat of antitrust action by the players real, or is an antitrust action under the Curt Flood Act of 1998 an idle one?

One important caveat to the use of antitrust action by the players is that the alleged misconduct must not apply to issues covered under the current collective bargaining agreement. The Eighth Circuit established this rule in *Mackey v. National Football League*.[191] In *Mackey*, the defendant, Pete Rozelle, commissioner of the National Football League, implemented the so-called "Rozelle Rule" to resolve free agent compensation disputes.[192] According to the Rozelle Rule, the Commissioner had the final decision regarding the compensation of one team to another team for the loss of a free agent player if an adequate means of compensation could not be negotiated.[193] Several players filed suit against the league, claiming that the Rozelle rule was "an illegal combination and conspiracy in restraint of trade denying professional football players the right to freely contract for their services."[194]

The Eighth Circuit held that in order for a player to bring an antitrust claim against the league, he must demonstrate the following: (1) that the restraint of trade alleged was beyond the scope of the collective bargaining agreement; (2)

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[189] *Id.* § 27a(c).

[190] *Id.* § 27a(d)(2).

[191] 543 F.2d 606 (8th Cir. 1976).

[192] *See id.* at 606, 609 n.1.

[193] *See id.*

[194] *Id.* at 609.

that the restraint on trade does not effect a mandatory subject of collective bargaining; and (3) that the agreement is not a result of arm's length bargaining.[195] In *Mackey*, the court held that the players could bring an antitrust suit against the league because the Rozelle Rule was not a product of arm's length negotiations.[196]

Accordingly, a professional baseball player aspiring to bring an antitrust claim must fulfill the criteria of the three-part test as elucidated in *Mackey*. In other words, the player would have to demonstrate that the alleged misconduct by the owners was not part of the collective bargaining process and was not protected by the nonstatutory labor exemption.

A baseball player wishing to bring an antitrust suit against the owners may find it difficult to demonstrate that any given potential cause of action was outside the collective bargaining process, given the long history of collective bargaining between the players and owners. First, in any issue that a player may be litigating, the parties involved in the litigation would in all likelihood involve the players and the owners, the very parties to the collective bargaining agreement.[197] Second, the issues of an antitrust suit by a player most likely would concern the terms and conditions of his employment, which are mandatory subjects of collective bargaining in professional sports.[198] Third, because baseball has relied upon collective bargaining to resolve key economic labor issues, a player would, in all likelihood, encounter difficulty in arguing that the terms and conditions of his employment were not forged through the collective bargaining process.[199] Therefore, it would appear that the nonstatutory exemption would be a major impediment to an antitrust action by a player during the existence of any collective bargaining agreement.

The holdings in two cases, *National Basketball Association v. Williams*[200] and *Brown v. Pro Football, Inc.*,[201] further clarify the Eighth Circuit's ruling in *Rozelle* as to when a professional sports player may bring an antitrust suit against the owners by defining when and how long collective bargaining actually exists. With the decisions in *Williams* and *Brown*, the courts have added to the proverbial hoops that a player must jump through before he will have an opportunity to bring an antitrust suit against the owners.

Before these two cases, the question of when the nonstatutory labor

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[195] *See id.* at 614.

[196] *See id.* at 616.

[197] *See* Kohm, *supra* note 118, at 1247.

[198] *See id.*

[199] *See id.*

[200] 45 F.3d 684 (2d Cir. 1995).

[201] 518 U.S. 231 (1996).

exemption expired had been answered inconsistently by the courts.[202] In general, four different standards for determining when the nonstatutory exemption expired were applied by various courts, as follows: (1) immediately upon a bargaining impasse;[203] (2) upon the expiration of a given collective bargaining agreement;[204] (3) beyond impasse "'for as long as the employer continues to impose a restriction under the reasonable belief that the restriction or a very similar restriction will be incorporated into the next collective bargaining agreement'";[205] and (4) the point at which the parties are "after impasse," provided that an "ongoing collective bargaining relationship" exists.[206]

The Second Circuit in *Williams* and the Supreme Court in *Brown* clarified any inconsistent interpretations of when the collective bargaining process exists through their decisions.[207] In *Williams*, the court held that "antitrust laws do not prohibit employers from bargaining jointly with a union, from implementing their joint proposals in the absence of a collective bargaining agreement, or from using economic force to obtain agreement to those proposals."[208] In *Brown*, the Supreme Court affirmed the Eighth Circuit's repudiation of the "upon expiration of a given collective bargaining agreement" test used by the district court. The Court held that, upon impasse during the negotiation process, the nonstatutory exemption would continue to waive antitrust liability insofar as a collective bargaining agreement existed.[209]

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[202] *See* Picher, *supra* note 99, at 34.

[203] *See id.* at 31 (discussing the standard that was established by the United States District Court for the District of Minnesota in *Powell v. National Football League, Inc.*, 711 F. Supp. 959, 964 (D. Minn. 1989), *rev'd*, 930 F.2d 1293 (8th Cir. 1989)).

[204] *See id.* at 31–32 (discussing the standard established by the United States District Court for the District of Columbia in *Brown v. Pro Football, Inc.*, 782 F. Supp. 125, 131–32 (D.D.C. 1991), *rev'd*, 50 F.3d 1041 (D.C. Cir. 1995), *aff'd*, 518 U.S. 231 (1996)).

[205] *Id.* at 32 (quoting the standard established by the United States District Court for the District of New Jersey in *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 967 (D.N.J. 1987)).

[206] *Id.* (discussing the standard established by the Eight Circuit in *Powell v. National Football League*, 930 F.2d 1293, 1302 (8th Cir. 1989)).

[207] *See id.* at 34 (citing Brown v. Pro Football, Inc., 518 U.S. 231 (1996); National Basketball Ass'n v. Williams, 45 F.3d 684 (2d Cir. 1995)).

[208] *Williams*, 45 F.3d at 693.

[209] *See Brown*, 518 U.S. at 230–31. The factual scenario giving rise to the litigation in *Brown* was that upon the expiration of the applicable collective bargaining agreement, the League and the football players began negotiating a plan that would allow teams to have "developmental squads" of reserve players. *See id.* at 234. The League wanted to pay the players a $1000 weekly salary; the players, on the other hand, wanted the squad members to be able to negotiate the terms of their contracts. *See id.* After an impasse in negotiations had occurred, the League unilaterally implemented its proposal. *See id.* at 235.

When the players challenged the unilaterally implemented salary system for

The holdings of these cases help clarify the time at which a player may bring an antitrust action against the owners. A player would have to demonstrate the following: (1) that the cause of action is outside the province of the current or expired collective bargaining agreement (which would be difficult, as indicated above); or (2) that the players and owners are not involved in the collective bargaining process—that is, the union would have to be decertified.[210]

2. *Would the Players Choose to Decertify as a Means to Achieve Their Objectives?*

Some commentators believe that the likelihood of the MLBPA to decertify is slight.[211] However, given the MLBPA's push during the 1993–1994 collective bargaining negotiations for Congress to create antitrust legislation, it appears that the MLPBA would consider decertification as a viable action in the face of owner action that would violate antitrust law.[212] If the MLBPA is serious about decertification, antitrust action is not an idle threat by the players against the owners; thus, when a dispute arises between the owners and players during the next collective bargaining agreement, which is almost a virtual certainty given their history of acrimonious negotiations, the players will have an alternative action against the owners.

3. *Would Antitrust Action by the Players Be Successful?*

Given the fact that the issue of a salary cap/revenue-sharing system has been a major source of contention between the players and the owners for the last three collective bargaining negotiations, such a system will in all probability be the source of impasse during the next negotiations. An analysis of the salary cap/revenue-sharing system under the "rule of reason" test may prove useful in

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developmental players as violative of antitrust law, the Supreme Court held that the "postimpasse imposition of a proposed employment term concerning a mandatory subject of bargaining" was not a violation of antitrust law, insofar as the parties were subject to good faith bargaining. *Id.* at 238–39. Further, the Court's opinion elucidated four actions that employers could take after an impasse that potentially could violate antitrust law but were exempt because of the nonstatutory exemption, as follows: (1) maintain the status quo; (2) implement the last offer; (3) lock out their workers; or (4) negotiate separate interim agreements with the union. *See id.* at 245.

[210] *See* Picher, *supra* note 99, at 37.

[211] *See, e.g.*, Sica, *supra* note 68, at 295.

[212] *See* Joshua Hamilton, Comment, *Congress in Relief: The Economic Importance of Revoking Baseball's Antitrust Exemption*, 38 SANTA CLARA L. REV. 1223, 1251 (1998); Mark Maske, *Both Sides File Charges with NLRB; Baseball Players, Owners Say Good Faith Lacking*, WASH. POST, Dec. 28, 1994, at C1.

that it will predict the success of an antitrust action by the players against the owners upon the implementation of such a system and thus will gauge the efficacy of an antitrust suit as a bargaining tool for the players.

An analysis of the salary cap/revenue-sharing system under the "rule of reason" test, established by the Supreme Court in *Standard Oil Co. v. United States*,[213] will demonstrate whether such a system is violative of antitrust law. The rule of reason test is utilized by courts to determine whether the actions of enterprises within a particular industry serve as a restraint of trade; the test states that any restraint of trade by a party must be done with a legitimate purpose and that the restraint imposed must be one that merely regulates or perhaps fosters competition.[214]

In *McNeil v. National Football League*, the rule of reason test was applied to the player-restraint context in professional sports.[215] First, the players have the burden of proving that a provision implemented by the owners will have a substantial effect upon the relevant market (in baseball, the competition for players' services)[216] and that the detrimental anticompetitive effects of this practice outweigh any beneficial effects.[217] Once the players have fulfilled their burden of proof, the owners have the burden of proof of demonstrating that the restraint has a legitimate business purpose[218]—in other words, that the salary cap maintains a competitive balance in the league. The league also must demonstrate that the restraint is "no more restrictive than reasonably necessary."[219]

Applied to the salary cap/revenue-sharing system, an antitrust action may not be brought against the owners unless the players are able to fulfill the threshold burden of demonstrating that the salary cap is a form of restraint on trade. The players would be successful in fulfilling this burden because a salary cap system is designed to limit the movement of players from team to team for higher compensation. The cap would prevent teams who have reached the salary ceiling of the cap from signing the most talented players, which in turn would cause a drag in player salaries.

The next issue to be resolved under the rule of reason test is whether the owners have a legitimate purpose for restraining player movement.[220] The owners should not have a problem fulfilling this part of the rule of reason test

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[213] 221 U.S. 1 (1911).

[214] *See id.* at 38.

[215] *See* McNeil v. National Football League, Civ. No. 4-90-476, 1992 WL 315292, at *1–*7 (D. Minn. Sept. 10, 1992).

[216] *See id.* at *3.

[217] *See id.*

[218] *See id.* at *4.

[219] *Id.* at *5.

[220] *See* Picher, *supra* note 99, at 52–53.

because a salary cap would restore the competitive balance among the teams and would preserve the financial stability of the individual teams, particularly the small-market teams. The owners have a plausible argument that because a salary cap system would preclude large-market teams from stockpiling talent by offering contracts that small-market teams cannot match, the salary cap system represents a legitimate restraint. Thus, the salary cap system would result in the rebalancing of competitiveness among the teams and the fostering of fan interest in the league.

The final issue under the rule of reason test is whether there is a less-restrictive viable alternative as applied to the salary cap.[221] Unfortunately for the owners, the salary cap/revenue-sharing system violates this prong of the rule of reason test because an alternative, less drastic measure to the salary cap exists. For example, the salary taxation system of the current collective bargaining agreement represents a less restrictive alternative system to a salary cap/revenue-sharing system.[222] The salary taxation system, like a salary cap/revenue-sharing system, causes a drag in player salaries due to the fact that teams with the highest payrolls are taxed for spending money for high-priced talent. However, unlike the salary cap/revenue-sharing system, there is no "absolute barrier" with the salary taxation system that prevents owners from signing free agents.[223] Although both systems represent a restraint on labor competition and both systems result in an even distribution of talent across teams, the salary taxation system is less burdensome to player movement by virtue of the fact that there is no cap to prevent owners from signing free agents. Furthermore, there are systems other than the salary taxation system which essentially accomplish the goals of the salary cap/revenue-sharing system without being so restrictive to player movement.[224] Thus, it appears that a salary cap/revenue-sharing system will not pass this second prong of the rule of reason test.

Since a salary cap/revenue-sharing system in all probability would violate antitrust law, the owners should give second thoughts to coercing the players into such a system. If the players were to agree to such a system in the next collective bargaining agreement and the salary cap/revenue-sharing system were to cause a stronger drag on their salaries, the players could bring an antitrust suit against the owners that probably would succeed.

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221 *See id.* at 60.

222 *See id.*

223 *Id.*

224 Some alternative methods to a salary cap/revenue-sharing system include sharing revenue between owners without salary restraints, abolishing salary arbitration, creating an unprotected player pool, and making offers to minor league players as free agent compensation. *See id.* at 61.

4. *How Will the Threat of Antitrust Action Effect the Player-Owner Relations During the Collective Bargaining Process?*

As stated above, the predominant characteristic of the current negotiation process in baseball has been one of positional bargaining between the owners and players. This positional bargaining process has fostered animosity between the owners and the players, and it has prompted them, particularly the owners, to use bad faith bargaining tactics in attempts to realize their interests.

What effects will the lifting of the antitrust exemption and the possibility of owner liability under the Sherman Act have upon the state of negotiations in baseball? If the players convince the owners that an antitrust action is a legitimate part of their bargaining arsenal, the players potentially could force the owners to refrain from taking actions that could be considered "bad faith bargaining." Before the enactment of the Curt Flood Act of 1998, if the owners acted in bad faith, the players either had to "put up with it or go on strike,"[225] both undesirable maneuvers for the players. With the lifting of the antitrust exemption by the Curt Flood Act, the players could force the owners into litigation by bringing an antitrust suit under the Sherman Act. Given the high costs of litigation, the owners in all probability would opt for good faith bargaining over the probability of a costly trial battle and the negative publicity that would accompany it.[226] A further beneficial result of the threat of litigation and the resulting good faith bargaining by the owners would be a de-emphasis on the Act, thereby striking the balance in favor of the players, that is, as a bargaining tactic.[227]

Thus, the lifting of the antitrust exemption from baseball will have a direct effect upon the negotiation process used by the owners and the players. The possibility of an antitrust action would prompt the owners to act in good faith, thus alleviating some of the hostility that often is felt by both sides as a result of bad faith bargaining.

VII. CONCLUSION

The history of collective bargaining in baseball has been a lesson in difficult battles. While the players and the owners have negotiated labor issues through collective bargaining, the process has proven to be costly, both financially and to its reputation as an American pastime. Collective bargaining in baseball will continue to be acrimonious until the players and owners switch from a positional bargaining methodology to a principled one. Fortunately for baseball, the lifting

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[225] Chaplin, *supra* note 157, at 232.

[226] *See id.*

[227] *See id.*

of baseball's antitrust exemption likely will have a positive impact upon baseball's current collective bargaining status by inducing the owners to act in good faith bargaining, which has not always been their bargaining posture, and by offering the players an alternative action other than striking and postponing a season, an action that altogether has been too detrimental to the image of the game.